No. 91-5771

In the Supreme Court of the United States

OCTOBER TERM, 1991

HAROLD RAY WADE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

NINA GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court has authority to review the government's decision not to file a motion under 18 U.S.C. 3553(e) or Sentencing Guidelines § 5K1.1 requesting that the court sentence a defendant below the statutory minimum or the Guidelines sentencing range based on the defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense."

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OPINION BELOW

The opinion of the court of appeals (J.A. 23-29) is reported at 936 F.2d 169.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1991. The petition for a writ of certiorari was filed on September 10, 1991, and was granted on December 9, 1991. J.A. 30. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND SENTENCING GUIDELINE INVOLVED

1. Section 3553(e) of 18 U.S.C. provides:

> **Limited authority to impose a sentence below a statutory minimum.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

2. Section 994(n) of 28 U.S.C. provides:

> The [Sentencing] Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

3. Sentencing Guidelines § 5K1.1 provides:

> **Substantial Assistance to Authorities (Policy Statement)**
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

STATEMENT

Following his guilty plea in the United States District Court for the Middle District of North Carolina, petitioner was convicted of conspiring to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; distributing cocaine and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and using a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). J.A. 16. Petitioner was sentenced to a total of 15 years' imprisonment, to be followed by an eight-year term of supervised release. J.A. 18-19. The court of appeals affirmed. J.A. 23-29.

1. On October 30, 1989, police officers executed a search warrant at petitioner's residence in Gibsonville, North Carolina. After discovering 978 grams

of cocaine, two handguns, and more than $22,000 in cash, the officers arrested petitioner. Following his arrest, petitioner admitted that he and an accomplice, Dwight Marks, had traveled to Florida a few days earlier, where they had purchased a kilogram of cocaine for resale in North Carolina. Petitioner made a telephone call to Marks, who agreed to meet with the officers and to cooperate in the investigation. Presentence Report 1-2.

2. The Presentence Report noted that petitioner was subject to a mandatory minimum sentence of ten years' imprisonment on the drug charges and a mandatory consecutive sentence of five years' imprisonment on the firearms charge. Presentence Report 7; see 21 U.S.C. 841(b)(1)(B); 18 U.S.C. 924(c). In the portion of the Report that calculated the applicable Sentencing Guidelines range, the probation officer recommended a two-level upward adjustment in petitioner's offense level for obstruction of justice, pursuant to Guidelines § 3C1.1. The probation officer found that petitioner had obstructed justice by writing a letter urging another man to make a false claim that he was the owner of the handguns found in petitioner's residence. Presentence Report 2. In the absence of a statutory minimum sentence, the Presentence Report concluded that the applicable Guidelines range for the drug offenses would be 97 to 121 months' imprisonment.[1] Because of the ten-year statutory minimum sentence, however, the Report concluded that the actual Guidelines range for that offense was 120 to 121 months. Presentence Report 7; see Guidelines § 5G1.1(c)(2).

[1] For the firearms offense, the Guidelines sentence was the same as the mandatory five-year term of imprisonment required by 18 U.S.C. 924(c)(1). Presentence Report 3; see Sentencing Guidelines § 2K2.4(a).

At the sentencing hearing, petitioner's counsel did not object to the Presentence Report's calculation of the Guidelines range. Petitioner's counsel specifically stated that he had "no objections" to the finding that an upward adjustment was warranted based on petitioner's obstruction of justice. J.A. 7. Counsel argued, however, that the district court should sentence petitioner to less than the ten-year statutory minimum sentence for the drug offense. Although the government had not filed a motion requesting a downward departure based on petitioner's cooperation, see 18 U.S.C. 3553(e); Guidelines § 5K1.1, petitioner's counsel argued that the court should nonetheless sentence petitioner to less than ten years' imprisonment on that count because of petitioner's cooperation with the government. J.A. 8-9. In support of that claim, petitioner's counsel proffered evidence that petitioner had sought to cooperate with the government after his arrest by meeting with federal agents and providing them with information about other drug traffickers. In response to the court's suggestion that he "state for the record * * * what the evidence would be," petitioner's counsel said:

> Other than the evidence, which is quite correct that's in the presentence report in paragraphs 9 and 10, the evidence would be that Mr. Wade met on, I believe, several occasions with Agent Deignan of the Drug Enforcement Administration, that he was of assistance in beginning an investigation which led to the arrest of an unrelated person, a person not in this conspiracy. That arrest and case is going on in state court now, and to my knowledge has not been resolved as of yet. Mr. Wade played an instrumental role in that case.

> And that, additionally, Mr. Wade has offered to cooperate further in that case. And that, additionally, he has provided other assistance in the nature of identification of other people suspected of drug crimes in the Middle District.

J.A. 10. The district court declined to sentence petitioner below the statutory minimum based on petitioner's cooperation, concluding that it lacked the authority to do so in the absence of a motion by the government. J.A. 9. The court then sentenced petitioner to the statutory minimum sentences on both the drug and firearms charges. J.A. 14, 18.

3. The court of appeals affirmed. J.A. 23-29. The court observed that there "appear[ed] to be no disagreement on the fact that shortly after his arrest and without the benefit of a plea agreement, [petitioner] began a course of cooperation which provided valuable assistance to the government in other prosecutions." J.A. 24. But the court concluded that "[t]he unambiguous language of 18 U.S.C. 3553(e) leads to the single conclusion that courts may not depart downward from mandatory minimum sentences because of the substantial assistance of the defendant unless the government files a motion for departure." J.A. 25. Consequently, the court of appeals rejected petitioner's argument that the district court was authorized to depart downward for his substantial assistance, even when the government has not filed a motion requesting such a departure. J.A. 26.

The court of appeals also rejected petitioner's argument that the district court should have examined evidence concerning the value of his assistance and the government's reasons for not filing a motion, in order to determine whether the government acted in

good faith. The court held that, because "the government has the sole discretion in deciding whether to file a motion for downward departure for substantial assistance, it follows that the defendant may not inquire into the government's reasons and motives if the government does not make the motion." J.A. 28. The court noted, however, that a defendant could take advantage of the provisions of 18 U.S.C. 3553 (e) and Guidelines § 5K1.1 by "negotiat[ing] a plea agreement with the government under which the defendant agrees to provide valuable cooperation [in exchange] for the government's commitment to file a motion for a downward departure." J.A. 28-29. Absent a plea agreement, however, the court held that "the defendant is not entitled to an explanation for the government's refusal to make the motion or its refusal to enter into an agreement to make the motion." J.A. 29.

SUMMARY OF ARGUMENT

Section 3553(e) of Title 18 provides that a sentencing court may depart below a statutory minimum sentence only "[u]pon motion of the Government." Sentencing Guidelines § 5K1.1 likewise permits the court to depart below the applicable Guidelines sentencing range if the government files a motion requesting such a departure. The plain language of both provisions makes clear that a departure for substantial assistance to the government may not be granted unless the government files a motion requesting such a departure. Moreover, the statute provides no standards for the prosecutor to apply in determining whether to file such a motion, indicating that the decision whether to file the motion is committed to the prosecutor's discretion.

The government's decision whether to file a "substantial assistance" motion is similar to other decisions committed to the prosecutor's discretion, such as whether to initiate charges, what charges to bring, and whether to enter into plea negotiations. Charging decisions have always been treated as matters of Executive prerogative that are not subject to judicial review. Challenges to such decisions have been permitted only where the prosecutor's conduct has violated the Constitution. Thus, unless the prosecutor's conduct is deliberately based upon an unjustifiable standard such as race, religion, or another unconstitutionally arbitrary classification, or is intended to punish the defendant for exercising a protected statutory or constitutional right, it is not subject to judicial scrutiny.

Petitioner concedes that courts may not ordinarily review the government's decision not to file a substantial assistance motion, and that review is available only in the case of alleged constitutional violations. While professing to acknowledge strict limitations on judicial review, however, he seeks to introduce a regime of extensive judicial review through the back door. Under the guise of seeking protection from unconstitutional arbitrariness, petitioner argues that a defendant must be permitted to litigate the question whether the government has treated him differently from other similarly situated defendants. He further argues that the government must demonstrate that it has not done so by explaining in detail why it has refused to file a substantial assistance motion in his case.

Not a shred of authority supports petitioner's suggestion that a defendant can obtain review of a prosecutor's exercise of discretion to file a substantial assistance motion on the ground that the prose-

cutor has failed to treat similarly situated defendants the same in a particular instance. As long as the prosecutor avoids acting on a constitutionally forbidden ground, his exercise of discretion is not subject to review.

There is no need or justification for a remand in this case to allow the district court to inquire into the prosecutor's reasons for refusing to file a substantial assistance motion. On this subject, as in the case of charging decisions, the prosecutor is presumed to act in good faith. Consequently, as petitioner himself concedes, a defendant is not entitled to discovery or a hearing unless he makes a substantial threshold showing that the prosecutor has acted on an unconstitutional basis.

Petitioner has made no showing whatever that the prosecutor's refusal to file a substantial assistance motion in his case was based on an unconstitutional motive or standard. Indeed, petitioner has not even alleged a constitutional violation. Petitioner's assertion that the district court refused to allow him to make a factual record on that issue is incorrect. To the contrary, the district court invited petitioner to make a proffer of evidence, and petitioner's proffer concerned only the extent and value of his assistance to the government. In effect, petitioner's argument is that the prosecutor was simply wrong in deciding that he did not offer substantial assistance in the investigation and prosecution of others. His request to the district court was for that court to examine the degree of his assistance and to override the prosecutor's decision that a substantial assistance motion was not called for in his case. But that is simply a request for plenary judicial review of the prosecutor's decision not to file a motion, which is

what petitioner concedes is not allowed. As the courts below properly concluded, the claim that petitioner made before the district court was not subject to judicial review.

ARGUMENT

PETITIONER WAS NOT ENTITLED TO A REDUCTION OF HIS SENTENCE BASED ON HIS CLAIM THAT HE PROVIDED "SUBSTANTIAL ASSISTANCE" TO THE GOVERNMENT

A. A Court May Grant A Reduced Sentence For Substantial Assistance Only If The Government Files An Appropriate Motion

Section 3553(e) of Title 18 provides that "[u]pon motion of the Government," a court shall have the authority to impose a sentence below the level otherwise required "so as to reflect a defendant's substantial assistance" in an investigation or prosecution. Sentencing Guidelines § 5K1.1 likewise authorizes a court to impose a sentence below the Guidelines sentencing range "[u]pon motion of the government stating that the defendant has provided substantial assistance" in the investigation or prosecution of another offender. The language of the two provisions is essentially identical, and they have therefore been construed similarly. See *United States* v. *Hayes*, 939 F.2d 509, 511 (7th Cir. 1991), cert. denied, 112 S. Ct. 896 (1992); *United States* v. *Gardner*, 931 F.2d 1097, 1099 (6th Cir. 1991); *United States* v. *Kuntz*, 908 F.2d 655, 657 (10th Cir. 1990); *United States* v. *Francois*, 889 F.2d 1341, 1344-1345 (4th Cir. 1989), cert. denied, 494 U.S. 1085 (1990).[2]

[2] The Court granted certiorari to review the question "[w]hether a Federal District Court has the power to review the United States Attorney's decision not to file pleadings pursuant to Section 5K1.1 of the Sentencing Guidelines." Pet. i. In his brief on the merits, however, petitioner addresses only the scope of judicial review of the prosecutor's refusal to file a motion under 18 U.S.C. 3553(e). See Pet. Br. 9. Petitioner explains (Pet. Br. 9 n.2) that he has "rephrased the question presented" because the Sentencing Commission recently requested public comment on a proposed amendment to Guidelines § 5K1.1 that would eliminate the government motion requirement for "substantial assistance" departures below the applicable Guidelines range. See 57 Fed. Reg. 112 (1992). But the Sentencing Commission has merely published the proposed amendment for comment. The proposal has not been endorsed or adopted by the Commission. See *id.* at 90 ("Publication of an amendment for comment does not necessarily indicate the view of the Commission or any individual Commissioner on the merits of the proposed amendment."). In any event, a proposal for an amendment to Guidelines § 5K1.1, even if endorsed by the Commission, would not alter the question on which this Court granted certiorari.

We agree, however, that because petitioner sought a sentence below the statutory minimum, both 18 U.S.C. 3553(e) and Sentencing Guidelines § 5K1.1 apply to this case. See Guidelines § 5K1.1, Application Note 1 (defendant's substantial assistance may justify sentence below statutory minimum "[u]nder circumstances set forth in 18 U.S.C. § 3553(e)"). Because a statutory minimum sentence automatically becomes the minimum Guidelines sentence if the minimum Guidelines sentence would otherwise be below the statutory minimum sentence, see Guidelines § 5G1.1(b), a downward departure would have required the court to depart from both the Guidelines range and the statutory minimum sentence. Consequently, we address both Section 3553(e) and Section 5K1.1.

By their terms, Section 3553(e) and Guidelines §5K1.1 permit a sentencing court to depart downward for substantial assistance only when the government makes a motion to that effect. Congress and the Sentencing Commission plainly stated their intent to condition a downward departure for substantial as-

sistance on the filing of a government motion. The caption of Section 3553(e) reinforces the plain language of the statute by emphasizing that the sentencing court has only "limited" authority to depart below the statutory minimum; that is, the court's authority is limited to cases in which the government files the requisite motion. The courts of appeals have agreed with that construction and have held that a motion by the government is a prerequisite to a sentence below the statutory minimum or a downward departure from the Guidelines sentencing range for substantial assistance.[3]

B. The Decision Whether To File A Substantial Assistance Motion Is Committed To The Prosecutor's Discretion

Petitioner concedes (Br. 12) that "the decision to seek a downward departure for substantial assistance is committed by statute to the discretion of the prosecutor." That concession is consistent with the text of Sections 3553(e) and 5K1.1, which place no limits on the prosecutor's decision to file a "substantial assistance" motion and contain no suggestion that that decision is subject to judicial review.

1. This Court's decisions under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, are instructive in analyzing whether a prosecutor's decision

[3] See *United States* v. *Long*, 936 F.2d 482, 483 (10th Cir.), cert. denied, 112 S. Ct. 662 (1991); *United States* v. *Alamin*, 895 F.2d 1335, 1337 (11th Cir.), cert. denied, 111 S. Ct. 196 (1990); *United States* v. *Coleman*, 895 F.2d 501, 504-505 (8th Cir. 1990); *United States* v. *Francois*, 889 F.2d at 1343; *United States* v. *Huerta*, 878 F.2d 89, 91 (2d Cir. 1989), cert. denied, 493 U.S. 1046 (1990); *United States* v. *Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989), cert. denied, 493 U.S. 1047 (1990).

not to file a substantial assistance motion is subject to review in court. Judicial review of agency action is foreclosed under the APA if the statute in question indicates that a particular matter is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). See *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988); *Heckler* v. *Chaney*, 470 U.S. 821 (1985). A matter is "committed to agency discretion by law" if the statute in question "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. In that setting, the statute is drawn "in such broad terms that in a given case there is no law to apply." *Webster*, 486 U.S. at 599, quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971)).

Section 3553(e) is such a statute. It has two parts. The second part, which is directed to the court, authorizes the court to grant a reduction in the defendant's sentence "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." The first part, which is directed to the government, simply provides that the court's action is contingent on the government's filing a motion permitting such a reduction. The statute does not condition the government's exercise of its discretion to file the motion in any way: it does not require that a motion be filed in the case of all defendants who provide substantial assistance; it does not suggest that a motion must be filed if the defendant has provided a particular kind or quality of assistance; and it certainly does not suggest that defendants who are unhappy with the government's decision not to file a motion will be entitled to review of the merits of that decision. In

short, the portion of Section 3553(e) that is directed to the government is written in such broad terms that "in a given case there is no law to apply."

The parallel provision of the Sentencing Guidelines likewise reflects an intention to commit the decision whether to file a motion to the government's discretion. Section 5K1.1 of the Guidelines provides that the court may depart if the government files a triggering motion "stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." Like the statute at issue in *Webster* v. *Doe*, *supra*, which allowed termination of a CIA employee whenever the Director "shall *deem* termination necessary or advisable in the interests of the United States," 486 U.S. at 600, Guidelines § 5K1.1 "fairly exudes deference" to the government's decision. *Ibid.* The language of the Guideline, like the language of the statute, does not authorize a court to question whether the government correctly assessed the degree and quality of the defendant's assistance. Rather, it suggests that as long as the government recites that the defendant has provided such assistance, the court is authorized to grant (or refuse to grant) a reduction of sentence on that basis. There is no hint whatever that if the government declines to file such a motion, the court may second-guess that decision.[4]

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[4] A different issue is presented if the government enters into a plea agreement that requires the government to file a substantial assistance motion. In that case, the court may enforce the agreement or allow the defendant to withdraw his guilty plea. See *Santobello* v. *New York*, 404 U.S. 257, 262 (1971); *United States* v. *Conner*, 930 F.2d 1073, 1075 (4th Cir.) ("once the government uses its § 5K1.1 discretion as a bar-

2. The discretion accorded to the prosecutor by Congress and the Sentencing Commission in Sections 3553(e) and 5K1.1 is analogous to the "exclusive authority and absolute discretion" enjoyed by the government in determining whether to prosecute, see *United States* v. *Nixon*, 418 U.S. 683, 693 (1974), and what charges to bring, see *Ball* v. *United States*, 470 U.S. 856, 859 (1985); *United States* v. *Batchelder*, 442 U.S. 114, 124-125 (1979). This Court has said that judicial deference to the prosecutor's "broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte* v. *United States*, 470 U.S. 598, 607 (1985); see *Town of Newton* v. *Rumery*, 480 U.S. 386, 396 (1987).

As the Court explained in *Wayte*, "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." 470 U.S. at 607. Moreover, the Court has recognized that judicial review of prosecutorial charging decisions "entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Ibid.* Because of these "substantial concerns," courts are "properly

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gaining chip in the plea negotiation process, that discretion is circumscribed by the terms of the agreement"), cert. denied, 112 S. Ct. 420 (1991).

hesitant to examine the decision whether to prosecute." *Id.* at 607-608.[5]

The prosecutor's decision whether to file a substantial assistance motion, like the decision whether to prosecute and what charges to bring, is not readily amenable to judicial review. In assessing the values of a particular defendant's cooperation, the prosecutor is likely to consider a variety of factors related to the defendant's assistance, including the quantity, quality, timeliness, completeness, and usefulness of that assistance in criminal investigations and prosecutions. In addition, the prosecutor may consider the degree of risk the defendant incurred by cooperating.

In evaluating those factors, the prosecutor is likely to draw on his experience with other defendants to

[5] Once charges have been filed, the decision whether to plea bargain is also committed to the discretion of the prosecutor. See *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977) ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."); *Newman* v. *United States*, 382 F.2d 479, 480, 482 (D.C. Cir. 1967) (treating the decision whether to plea bargain as an aspect of the prosecutor's discretion to decide "when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought" and holding that "it is not the function of the judiciary to review the exercise of executive discretion.")

The courts have been similarly reluctant to review prosecutorial decisions to dismiss charges. Although under Fed. R. Crim. P. 48(a), the prosecutor may dismiss an indictment only with leave of court, the courts have emphasized that leave of court should be granted except in the most unusual circumstances. Thus, in applying Rule 48(a), the courts have recognized a presumption that the prosecutor acted in good faith and that his decision should be followed. See *United States* v. *Cowan*, 524 F.2d 504, 514 (5th Cir. 1975); *United States* v. *Ammidown*, 497 F.2d 615, 621 (D.C. Cir. 1973).

provide a basis for comparison. In addition, in deciding whether to file a motion, the prosecutor must balance the costs of seeking a lower sentence for one defendant against the potential benefits of encouraging cooperation by defendants generally. Because, as petitioner concedes (Br. 24), the prosecutor is "uniquely competent" to decide whether to file a substantial assistance motion, and because that decision turns on questions of law enforcement policy that are not well suited to judicial review, "[d]eciding whether to make a § 5K1.1 motion is fundamentally like deciding to prosecute on lesser charges persons who provide more assistance." *United States* v. *Smith*, No. 90-3606 (7th Cir. Jan. 14, 1992), slip op. 9. See *United States* v. *Grant*, 886 F.2d 1513, 1514 (8th Cir. 1989) (government motion requirement "is predicated on the reasonable assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance") (quoting *United States* v. *White*, 869 F.2d 822, 829 (5th Cir.), cert. denied, 490 U.S. 1112 (1989)); *United States* v. *Ayarza*, 874 F.2d at 653 ("it is rational for Congress to lodge some sentencing discretion in the prosecutor, the only individual who knows whether a defendant's cooperation has been helpful").[6]

[6] Amicus National Association of Criminal Defense Lawyers asserts (Br. 15) that the decisions whether to prosecute and what charges to bring are not analogous to the decision whether to file a substantial assistance motion, because "there are several layers of protection for a defendant between the charge and the sentence," such as indictment by a grand jury and trial by jury. But if there is an equally strong prima facie case against two individuals, the prosecutor's decision to bring lesser charges, or none at all, against one of them has a direct and substantial effect on the prospect of conviction and punish-

The legislative history of 18 U.S.C. 3553(e) underscores the close parallel between the prosecutor's charging decision and the decision to file a "substantial assistance" motion. The provision that became Section 3553(e) was proposed to Congress by the President as Section 504 of the Drug Free America Act of 1986, H.R. Doc. No. 266, 99th Cong., 2d Sess. (1986). The explanation that accompanied that provision stated:

> With the creation of mandatory minimum sentences, such as those established by this part for the most serious Controlled Substances Act violations, there is a need to provide an exception for defendants who cooperate to a substantial extent in the investigation or prosecution of others. Defendants would be unlikely to cooperate if they believed that despite their efforts they would be subjected to mandatory minimum prison terms. The prosecution of those at the highest levels of a drug ring, for example, would be practically impossible without the cooperation of other defendants. By providing authority for the sentencing court to sentence a defendant below a statutory minimum, this amendment allows for a defendant's record to reflect accurately his or her involvement in the crime charged, *rather than a less serious offense charged by the prosecutor to avoid mandatory minimum sentences.*

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ment. Indeed, the prosecutor's exercise of discretion at the charging stage will typically have a greater effect on the defendant than the exercise of discretion with respect to a substantial assistance motion, since a decision in the defendant's favor on substantial assistance merely results in a possible reduction in sentence, while a decision in the defendant's favor at the charging stage may make the difference between conviction and imprisonment on the one hand, and no criminal charges at all on the other.

Id. at 117-118 (emphasis added). See also 132 Cong. Rec. 21,964 (1986) (remarks of Sen. D'Amato) purpose of similar provision in earlier bill was "to provide our U.S. attorneys with the authority they need to obtain cooperation and information from drug dealers.")

These materials indicate that the purpose of the substantial assistance motion was to provide a means for prosecutors to obtain and reward cooperation by major offenders, which would otherwise require the prosecutors to manipulate the charging decision. Because the substantial assistance motion was designed as simply a more straightforward means of achieving the same end, there is no reason to believe that Congress intended to impose a stricter regime of judicial review for substantial assistance decisions than for charging decisions.

Judicial review of the basis for the prosecutor's refusal to file a substantial assistance motion, like judicial review of the prosecutor's decision whether to bring charges, would entail substantial systemic costs and pose serious problems of administration. Because "[d]efendants often estimate the value of their assistance, and the risks they have taken to provide it, more highly than does the prosecutor," *United States* v. *Smith*, slip op. 2, the prosecutor's decision not to file a substantial assistance motion would become an issue in a large number of cases in which the defendant cooperated with the government in some way. Moreover, a defendant would presumably be entitled to discovery to determine the basis for the prosecutor's decision, and to compare his case with other cases. Criminal proceedings would be slowed by the requirement of additional discovery and a hearing. And examination of the internal deliberative

process by which such prosecutorial decisions are made would often require that the prosecutor testify to explain his decision. The prosecutor would often be required to disclose details of the investigation of defendant's case, as well as other cases, to show that the defendant has not received less favorable treatment than other similarly situated defendants.[7] In addition to the burdens and disruption that would result, such disclosures could impede effective law enforcement and undermine the effectiveness of the substantial assistance provisions as a tool for encouraging cooperation by providing offenders with a "roadmap" of prosecutorial decisionmaking. Accordingly, the courts are properly hesitant to examine the prosecutor's decision not to file a substantial assistance motion.[8]

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[7] The commentary to Guidelines § 5K1.1 recognizes that judicial inquiry into a defendant's "substantial assistance" may result in the disclosure of information that could endanger the defendant or reveal an ongoing government investigation. See Guidelines § 5K1.1, Background (although district court must state reasons for reducing defendant's sentence under § 5K1.1, court may elect to provide reasons to defendant *in camera* or in writing under seal "for the safety of the defendant or to avoid disclosure of an ongoing investigation").

[8] Amicus National Association of Criminal Defense Lawyers challenges (Br. 4-19) the constitutionality of the government motion requirement on due process and separation of powers grounds. The petition did not present those issues, and they are therefore not properly before this Court. See Sup. Ct. R. 24.1(a). Indeed, petitioner himself expressly disclaims reliance on the arguments advanced by his amicus. Pet. Br. 20.

In any event, similar challenges have been rejected by every court of appeals that has considered them. See, *e.g.*, *United States* v. *Doe*, 934 F.2d 353, 356-358 (D.C. Cir.), cert. denied, 112 S. Ct. 268 (1991); *United States* v. *Harrison*, 918 F.2d 30, 33 (5th Cir. 1990); *United States* v. *Kuntz*, 908 F.2d 655, 657-658 (10th Cir. 1990); *United States* v. *Levy*, 904 F.2d at 1035-1036; *United States* v. *LaGuardia*, 902 F.2d 1010, 1013-1017 (1st Cir. 1990); *United States* v. *Lewis*, 896 F.2d 246, 249 (7th Cir. 1990); *United States* v. *Francois*, 889 F.2d at 1343-1345; *United States* v. *Grant*, 886 F.2d at 1513-1514; *United States* v. *Huerta*, 878 F.2d at 93-94; *United States* v. *Ayarza*, 874 F.2d at 653; *United States* v. *Musser*, 856 F.2d at 1487.

Amicus rests its due process argument on the erroneous assertion that defendants have a constitutionally protected liberty interest in receiving a reduced sentence for rendering substantial assistance to the government. But neither 18 U.S.C. 3553(e) nor 28 U.S.C. 994(n) (the statutory mandate for Guidelines § 5K1.1) places substantive limitations on the government's discretion to file a substantial assistance motion. Consequently, neither statute creates a protected liberty interest. See *United States* v. *Doe*, 934 F.2d at 360; see generally *Kentucky Dep't of Corrections* v. *Thompson*, 490 U.S. 454, 462-463 (1989) (statute creates a protected liberty interest by establishing "substantive predicates" that limit the discretion of officials). Nor do Section 3553(e) and Guidelines § 5K1.1 violate separation of powers principles. Sentencing "long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch." *Mistretta* v. *United States*, 488 U.S. 361, 390 (1989). Prior to 1987, the Executive Branch shared sentencing responsibility with the courts through the parole system. The substantial assistance motion gives the Executive Branch even less control over sentencing than did the parole system, since after a "substantial assistance motion the court may always refuse to grant the reduction for which the prosecution has moved. Giving the prosecutor authority to trigger a downward departure for substantial assistance therefore does not exceed the Executive's permissible role in sentencing.

3. Contrary to petitioner's contention (Br. 13-15), the sentencing court's "inherent supervisory power" does not independently justify judicial inquiry into the prosecutor's reasons for not filing a substantial assistance motion. It is true that a federal court

"[i]n the exercise of its supervisory authority * * * 'may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.'" *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988) (quoting *United States* v. *Hasting*, 461 U.S. 499, 505 (1983)). But it is also "well established" that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Bank of Nova Scotia*, 487 U.S. at 254 (quoting *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985)). In enacting 18 U.S.C. 3553(e), Congress assigned to the prosecutor the authority to determine whether to request a lower sentence on "substantial assistance" grounds. To permit the district court to second-guess the prosecutor's determination "would confer on the judiciary discretionary power to disregard the considered limits of the law it is charged with enforcing." *United States* v. *Payner*, 447 U.S. 727, 737 (1980). See also *Commissioner* v. *Asphalt Products, Inc.*, 482 U.S. 117, 121 (1987) (per curiam) ("Judicial perception that a particular result would be unreasonable * * * cannot justify disregard of what Congress has plainly and intentionally provided."); Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1516 (1984) (courts may not use supervisory power to "limit the constitutionally permissible exercise of prosecutorial discretion").[9]

[9] Contrary to petitioner's contention (Br. 14-15), judicial inquiry into the prosecutor's decision not to file a substantial assistance motion is not "necessary to preserve the integrity of federal criminal proceedings" or to "deter future illegal or improper conduct by prosecutors." As long as the prosecutor's exercise of his discretion is within constitutional limits, the decision not to file a substantial assistance motion is neither "illegal" nor "improper," and it therefore cannot threaten the integrity of the court's proceedings. See *United States* v. *Payner*, 447 U.S. at 736 n.8 (court may not exercise supervisory power "as a substitute for established" constitutional doctrine); Beale, 84 Colum. L. Rev. at 1508 ("where no provision of the Constitution, federal statutes or procedural rules has been violated, there is no significant threat to judicial integrity"). Cf. *Bank of Nova Scotia* v. *United States*, 487 U.S. at 264 (Scalia, J., concurring) (no basis for a court to exercise supervisory power to discipline prosecutors "except insofar as concerns their performance before the court and their qualifications to be members of the court's bar").

C. A Prosecutor's Decision Not To Make A Substantial Assistance Motion Is Subject To Challenge Only If It Violates The Constitution

While the prosecutor's decision whether to file a substantial assistance motion is not routinely subject to judicial review, that is not to say that it is entirely insulated from challenge. If the prosecutor's refusal to make a substantial assistance motion is based on a constitutionally invalid classification or otherwise violates a constitutional right of the defendant, a court can grant relief.

In the closely analogous context of the charging decision, the Court has said that "although prosecutorial discretion is broad, it is not 'unfettered.'" *Wayte*, 470 U.S. at 608. "Selectivity in the enforcement of criminal laws is * * * subject to constitutional constraints." *United States* v. *Batchelder*, 442 U.S. at 125). Thus, although "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962), the Equal Protection Clause (and the "equal protection component" of the Fifth

Amendment Due Process Clause, see *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954)) forbids selective enforcement that is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); see *United States* v. *Batchelder*, 442 U.S. at 125 n.9. Similarly, a prosecutorial decision that is intended to punish a defendant for "exercising a protected statutory or constitutional right" violates the Due Process Clause. *United States* v. *Goodwin*, 457 U.S. 368, 372 (1982); see *id.* at 380 n.11 ("[a] charging decision does not levy an improper 'penalty' unless it results solely from the defendant's exercise of a protected legal right").

Permitting a defendant to advance constitutional claims despite the absence of a general right to judicial review is consistent with this Court's precedents regarding challenges to decisions that are "committed to agency discretion by law." Even when Congress has made it clear that it does not intend to permit judicial review of agency action, that does not bar challenges based on colorable constitutional claims. Rather, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). See *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) (requirement avoids "serious constitutional question of the validity of [a] statute" that precludes all judicial review of constitutional claims). Although Sections 3553(e) and 5K1.1 provide that a sentencing court shall have authority to depart downward for substantial assistance only upon motion of the government, there is no clear indication that Congress intended to preclude relief even if the government's conduct violates the Constitution. Consequently, the prosecutor's decision not to file a substantial assistance motion, like the decisions whether to prosecute and what charges to bring, may be challenged on the ground that the prosecutor has acted on the basis of race, religion, or some other unconstitutional criterion.

By the same token, however, judicial review of the prosecutor's decision not to file a substantial assistance motion should be no more extensive than judicial review of other matters committed to the prosecutor's discretion. See *United States* v. *Smith*, slip op. 8-9; *United States* v. *Romolo*, 937 F.2d 20, 24 n.4 (1st Cir. 1991); *United States* v. *Gonzales*, 927 F.2d 139, 145 (3d Cir. 1991); *United States* v. *Doe*, 934 F.2d 353, 361 (D.C. Cir.), cert. denied, 112 S. Ct. 268 (1991). Thus, there is no basis for petitioner's unexplained suggestion (Pet. Br. 24-25) that the sentencing court should determine whether the government's refusal to file a substantial assistance motion is "the result of 'bad faith' or 'arbitrariness' sufficient to constitute a substantive due process violation." Petitioner does not explain precisely what he means by "arbitrariness" or "bad faith." As the Seventh Circuit recently explained, "arbitrariness" refers generally to "unjustified disparities in the treatment of similarly situated persons." *United States* v. *Smith*, slip op. 3. "Bad faith," to the extent that it means something more than the prosecutor's consideration of a constitutionally forbidden characteristic such as race, appears to be nothing more than "an epithet that is attached to conduct that is substantively arbitrary." *Id.* at 8.

This Court has never held that "arbitrariness" is a basis on which to challenge an exercise of prosecutorial discretion. To be sure, the Court has said that a prosecutor's exercise of discretion "may not be

'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Wayte* v. *United States*, 470 U.S. at 608, quoting *Bordenkircher* v. *Hayes*, 434 U.S. at 364, quoting, in turn, *Oyler* v. *Boles*, 368 U.S. at 456. To the extent that the Court intended its reference to "other arbitrary classifications" to extend beyond constitutionally suspect classifications such as race and religion, the reference can apply only to the highly unlikely case in which the prosecutor classifies defendants according to factors that are not rationally related to whether they rendered substantial assistance. See *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). Absent evidence of such an irrational classification, however, a defendant's allegation that he provided useful assistance to the government is not sufficient to warrant judicial review of the prosecutor's decision not to move for a downward departure. If constitutionally cognizable "arbitrariness" were understood to mean simply the treatment of one defendant differently from others similarly situated, virtually any claim of "error" in the government's refusal to file a substantial assistance motion would be subject to judicial review.[10]

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[10] The lone decision petitioner cites (Pet. Br. 25) in support of his contention that discretionary decisions of the prosecutor are reviewable for "arbitrariness" or "bad faith," *United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979), does not support that proposition at all. In *Samango*, the court of appeals upheld the district court's dismissal of an indictment based on misconduct by the prosecutor during grand jury proceedings. Nothing in that decision suggests that either the district court or the court of appeals believed it had authority to review the government's charging decision to determine whether the prosecutor acted "arbitrarily" or in "bad faith." In any event, it is clear that the Ninth Circuit does not read its precedents as petitioner does, because that

To be sure, the sentencing process "must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). But petitioner's assertion (Br. 25) that unexplained sentencing disparities deny a defendant due process is mistaken. Outside the context of capital sentencing, the Court has rejected the argument that defendants are entitled to "an individualized determination that their punishment is 'appropriate.'" *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2701 (1991). See also *Chapman* v. *United States*, 111 S. Ct. 1919, 1928 (1991); *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989). When the prosecutor withholds a substantial assistance motion, the consequence is that the defendant receives the sentence that Congress and the Sentencing Commission determined to be appropriate for his offense and criminal history. That is all that due process requires. See *Chapman*, 111 S. Ct. at 1927-1929; cf. *Singer* v. *United States*, 380 U.S. 24, 36 (1965) (no "constitutional impediment" to conditioning defendant's waiver of jury trial on consent of prosecutor and trial court "when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing the Constitution guarantees him").[11]

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court has recently held that the prosecutor's charging decisions are not subject to review for arbitrariness. *United States* v. *Redondo-Lemos*, No. 90-10430 (Feb. 5, 1992).

[11] Contrary to petitioner's suggestion (Pet. Br. 22-23), the Due Process Clause does not require that decisions committed to the discretion of the prosecutor be made by a "neutral and detached decisionmaker," even though those prosecutorial choices will surely "have a significant impact on [the] defendant's liberty." The prosecutor's charging decisions are

D. Petitioner Did Not Make The Substantial Threshold Showing Required To Challenge The Constitutionality Of The Prosecutor's Decision

Petitioner contends (Br. 28) that this case should be remanded to the district court with instructions to "consider[] * * * the reasons for [the] prosecutor's refusal to move for a downward departure." Petitioner is not entitled to a remand because he has made no showing that the prosecutor exercised his discretion in an unconstitutional manner.

"[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). See also *United States* v. *Dotterweich*, 320 U.S. 277, 285 (1943). Accordingly, the courts of appeals agree that in order to obtain discovery or a hearing on a claim of selective or vindictive prosecution, the defendant bears the burden of producing evidence, not merely allegations, to support his claim that the prosecutor's motives were improper.[12] Petitioner

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not subject to such restrictions. And the prosecutor's authority under the substantial assistance provisions is only to *request* a lower sentence; the ultimate determination of the defendant's sentence is made by the district court, which is a "neutral decisionmaker." See *United States* v. *Levy*, 904 F.2d 1026, 1035 (6th Cir. 1990), cert. denied, 111 S. Ct. 974 (1991); *United States* v. *Musser*, 856 F.2d 1484, 1487 (11th Cir. 1988), cert. denied, 489 U.S. 1022 (1989).

[12] See, *e.g.*, *United States* v. *Heidecke*, 900 F.2d 1155, 1158-1160 (7th Cir. 1990); *United States* v. *Schoolcraft*, 879 F.2d 64, 67-69 (3d Cir.), cert. denied, 493 U.S. 995 (1989); *United States* v. *Hintzman*, 806 F.2d 840, 842 (8th Cir. 1986); *United States* v. *Jacob*, 781 F.2d 643, 646-647 (8th Cir. 1986); *United States* v. *Moon*, 718 F.2d 1210, 1229-1230 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984); *United States* v. *Gallegos-Curiel*, 681 F.2d 1164, 1167-1171 (9th Cir. 1982) (Kennedy, J.); *United States* v. *Torquato*, 602 F.2d 564, 569 (3d Cir.), cert. denied, 444 U.S. 941 (1979); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). Cf. *McCleskey* v. *Kemp*, 481 U.S. 279, 297 (1987) ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.").

himself concedes (Br. 26) that there is a "strong presumption that prosecutorial action is taken in good faith," and a defendant must make "a substantial threshold showing in order to obtain discovery or an evidentiary hearing on allegations of prosecutorial misconduct."[13]

Petitioner has made no showing whatever that the government's refusal to request that he be sentenced below the statutory minimum was based on an unconstitutional standard such as the defendant's race, religion, or his exercise of a protected right. Indeed, petitioner has never even alleged such prosecutorial

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[13] The courts of appeals have applied somewhat different formulations of the threshold showing requirement. See, *e.g.*, *United States* v. *Heidecke*, 900 F.2d 1155, 1158-1160 (7th Cir. 1990) (to obtain discovery, a defendant must show a "colorable basis" for a claim of vindictive prosecution; to obtain a hearing, the defendant must "offer sufficient evidence to raise a reasonable doubt that the government acted properly"); *United States* v. *Hintzman*, 806 F.2d 840, 846 (8th Cir. 1986) (to obtain discovery, a defendant must establish a "prima facie" case of selective prosecution); *United States* v. *Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986) (to obtain discovery on selective prosecution charge, defendant's allegations must raise "a legitimate issue" of government misconduct). There is no occasion in this case for the Court to decide which of these formulations is correct, because petitioner made no showing of any kind that the government exercised its discretion in an unconstitutional manner.

misconduct. Instead, petitioner merely urged the sentencing court to disregard the government's failure to file the required motion because he had in fact provided substantial assistance to the government. Because petitioner's objection to the government's refusal to file a substantial assistance motion rested solely on his disagreement with the prosecutor about the value of his cooperation, petitioner failed to make the threshold showing required to support a claim that the prosecutor's decision was based on an unconstitutional ground.[14]

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[14] There is no basis for entertaining a presumption that a prosecutor's refusal to file a substantial assistance motion is intended to penalize a defendant for exercising some constitutional or statutory right. In limited circumstances in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has applied such a presumption of unconstitutionality. See *Blackledge* v. *Perry*, 417 U.S. 21 (1974) (prosecutor's decision to file felony charges after defendant demands trial de novo on a misdemeanor charge); *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) (trial court imposes a harsher sentence following a successful appeal). But the Court has recognized that the presumption of vindictiveness "may operate in the absence of any proof of improper motive and thus may block a legitimate response to criminal conduct"; for that reason, the Court has declined to apply the presumption unless there is a "reasonable likelihood" of vindictiveness in a particular class of cases. *Goodwin*, 457 U.S. at 373; *Alabama* v. *Smith*, 490 U.S. 794, 799-802 (1989). There is no "reasonable likelihood" that a prosecutor will act out of vindictiveness in deciding whether to file a substantial assistance motion. The prosecutor has a strong interest in encouraging the cooperation of defendants and rewarding defendants who provide substantial assistance. The prosecutor's failure to make a substantial assistance motion on behalf of those defendants who have provided significant assistance to the prosecution is likely to impair the effectiveness of the prosecutor's efforts to persuade other defendants

In any event, the record discloses a wholly legitimate reason for the prosecutor's decision not to file a substantial assistance motion. Following petitioner's arrest, and during the same period that he purported to be cooperating with the government, petitioner wrote a letter to another man urging him to claim, falsely, that he was the owner of the guns found at petitioner's residence. See Presentence Report 2; Pet. Br. 3-4 n.1. Because of that conduct, the Presentence Report recommended that petitioner's offense level be increased for obstruction of justice, and petitioner's counsel stated at the sentencing hearing that the "finding[s] on both obstruction of justice and acceptance of responsibility are correct." J.A. 7. It is certainly rational for a prosecutor to require a defendant who is seeking a reduction in sentence for substantially assisting in the investigation or prosecution of other individuals to be truthful about the circumstances of his own offense and the involvement of others in that offense.

Petitioner nevertheless contends that a remand is necessary "[b]ecause the District Court in this case refused to entertain any inquiry whatsoever into the reasons for the prosecutor's failure to file the motion," and because "there is neither a finding below nor a factual record on that issue." Br. 27 n.19. Petitioner also argues that "the absence of any evidence in the record that the prosecutor's motives were improper * * * is not due to petitioner's in-

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to cooperate. See *United States* v. *Doe*, 934 F.2d at 358; *id.* at 362 (Ginsburg, J., concurring); *LaGuardia*, 902 F.2d at 1016; *Lewis*, 896 F.2d at 249; *Huerta*, 878 F.2d at 93. Petitioner therefore cannot meet his burden of establishing a likelihood of unconstitutional conduct by relying on a presumption that the prosecutor acted vindictively in his case.

ability to produce it, but to the District Court's refusal to entertain any allegations of prosecutorial misconduct, much less any evidence to support such allegations." Br. 27 n.20 (citing J.A. 10).

Petitioner's contentions are unpersuasive. First, as petitioner himself concedes (Br. 26), the district court should not inquire into the government's reasons for refusing to file a substantial assistance motion absent a threshold showing by the defendant that the government has exercised its discretion in an unconstitutional manner. Petitioner made no such showing; consequently, the district court was correct not to inquire into the prosecutor's motives or to make any findings on that issue. Second, petitioner's assertion that the district court "refus[ed] to entertain any allegations of prosecutorial misconduct" (Br. 27 n.20) is simply incorrect. The district court expressly invited petitioner's counsel to "state for the record * * * what the evidence would be." J.A. 10. Petitioner proceeded to make a proffer of evidence that concerned only the extent of his cooperation. J.A. 10-11. Petitioner's proffer contained nothing to suggest that the prosecutor's decision not to file the motion was based on unconstitutional considerations. *Ibid.* Petitioner has not made the substantial threshold showing that he himself concedes is necessary to justify judicial inquiry into the prosecutor's reasons for not filing a substantial assistance motion. Accordingly, the courts below properly rejected his claim.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

NINA GOODMAN
Attorney

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